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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted]
237

JEWEL G. BEREND, *Petitioner*

v.

J. F. PRITCHARD & CO., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JEWEL G. BEREND
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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on March 9, 1970.

OPINIONS BELOW

The Memorandum Opinion of the District Court and the unreported opinion of the Court of Appeals is reproduced as an appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides that "no person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

QUESTIONS PRESENTED

1. May a Plaintiff who is arguing on his own behalf be penalized by the lower courts' erroneous application of the Texas statute of limitations?

2. May a Plaintiff who is arguing on his own behalf be entitled to assistance from the Court in framing his pleadings and in obtaining a hearing on the major issues involved in his claim for relief?

STATEMENT OF THE CASE

Jewel G. Berend, appearing without counsel, had his claim against the defendant corporation dismissed as barred by the Texas Statute of Limitations (Arts. 5526, 5527, Vernon's Annotated Texas Civil Statutes) on September 17, 1969 in the United States District Court for the Northern District of Texas (Memorandum Opinion set out in Appendix A). On appeal to the United States Court of Appeals for the Fifth Circuit the dismissal was affirmed without a hearing. (No. 28651 Summary Calendar, March 9, 1970). (Per Curiam opinion set out in Appendix A.)

Berend is a specialist in a technical phase of the construction industry. He has designed and constructed

cooling towers and equipment for the cooling of industrial plants. For a period of more than twenty (20) year, Berend was the subcontractor for construction of cooling towers and equipment contracted by the Defendant, J. F. Pritchard and Company, Kansas City, Missouri, one of the largest companies in the construction of gas and oil industrial plant equipment. In accordance with written contracts between Berend and J. F. Pritchard & Company, the plaintiff built all of the cooling towers and equipment for the company's plants throughout the United States, Canada and Mexico, receiving fifty (50) percent of the company's profit on the sale of the cooling towers.

In addition, Berend owned the land and buildings at 3145 Alta Mere Drive, Fort Worth, Texas, used as a fabrication mill by J. F. Pritchard & Company. The mill and offices in Fort Worth were included in the fifty (50) percent profit agreement Berend had with J. F. Pritchard & Company.

In the process of maintaining and developing the cooling tower equipment for oil refineries and gas plants, it was necessary for Berend to work in hot enclosures saturated with hot blowing chemicals, gases and oils for weeks at a time. As a result of this hazardous work, Berend has become completely disabled and unable to work. Since 1954, Berend has suffered from a back injury caused by a fall which occurred while maintaining the equipment at Mexico City, Mexico (Mexico Government) Power Plant. Mr. Berend also received severe burns on his legs caused by an accident at Ohio Oil Refinery, Texas. As a result, he has required physical therapy treatments twice a week since 1952. Plus injuries in oil-gas-chemical plants, U.S.A.-Canada-Mexico.

In January, 1954, Berend's physical disabilities became so severe that he was unable to continue supervising the cooling tower operation. He traveled to Kansas City, Missouri, to meet with J. F. Pritchard, President of the company, in order to discuss the continuation of the cooling tower work under the supervision of Mr. Berend's brother or another assistant. While Berend could not actually supervise the subcontract work, he believed that he had built up an organization that could do the work effectively without his active participation. Berend checked into a hotel where he was confined to his room because of his physical disabilities. The President of the company refused to meet with him, but sent a representative. Despite the fact that Berend never said anything about going into business for himself (his injuries would have made this impossible), the Defendant proceeded on that assumption. The Defendant appropriated Berend's fifty-five (55) operations in nineteen (19) states. Plaintiff contends that in so doing, the Defendant's criminal act deprived him of operations with a future potential of over One Hundred Million Dollars ($100,000,000). On January 21, 1954, the Defendant sent the following letter to Berend (see Memorandum Opinion, Appendix), stating in part:

> All of our negotiations have been on the basis of revising our past procedures and accordingly if there is nothing that can be worked out, I do not see any possible procedure except to settle for past services on the basis of our existing agreements and procedure.
>
> It may be a little while before we have an idea of what this will amount to, but I can assure you that in figuring this out our inclination would be to be as reasonable as possible in view of your long

and satisfactory service with our company. Just as soon as we have a definite idea of what this will be shaping up to, we will let you know further, . . .

After receiving this letter, Berend wrote many letters to J. F. Pritchard asking for an explanation of the delay and for money due him under the contracts. These letters were never answered until he received the following letter dated October 13, 1966:

Dear Mr. Berend:

It is apparent that you are not aware of the death of Mr. J. F. Pritchard on May 3, 1966. His loss, like that of Mr. H. Arthur Martin in February, saddened those of us who knew and worked under his direction for so many years.

Your letters have been reviewed by responsible officials of the Company and by its counsel. Based upon advice of counsel, it is the opinion of the Management that the Company has no responsibility in connection with any of the matters referred to in your correspondence and accordingly, the Company is closing its file.

Yours very truly,

J. F. PRITCHARD & CO.

/s/ R. W. EATON
R. W. Eaton
Manager of Personnel

Mr. Berend filed a claim against J. F. Pritchard & Co. on May 29, 1969 in the U.S. District Court for the Northern District of Texas, asking for money due him under the written contracts with J. F. Pritchard & Company. Mr. Berend filed this claim without benefit of counsel. After being notified of the breach in October, 1966, he sought counsel and contacted two law

firms in Kansas City, Missouri, both of whom have represented the Defendant. Despite payment of a fee to a third attorney for filing the claim Berend discovered that the claim was never filed and he was unable to locate the attorney to discuss the matter further.

As a result of these events, Berend appeared in his own behalf at the hearing on August 23, 1969 in the U.S. District Court. Erroneously assuming that the breach of contract had occurred on January 21, 1954, the date of Defendant's letter to the Plaintiff, the Judge held that the claim was barred by the Texas Statute of Limitations, Art. 5526 and 5527, Vernon's Ann. Tex. Civ. Statutes, requiring that actions based on a breach of written obligations must be brought within four (4) years after they accrue, and actions based on obligations not in writing within two years after the breach. The Court did not inquire into the issue of when the cause of action accrued. Rather, it was assumed that the January, 1954 letter was the date of the breach, despite the promises made in that letter to pay Berend the money owed him. (See letter in Memorandum Opinion in Appendix). It was not until Berend received the company's letter of October 13, 1966 stating in part:

> . . . it is the opinion of the Management that the company has no responsibility in connection with any of the matters referred to in your correspondence and accordingly, the company is closing its file.

that he realized that the Company would not pay him money due under the contract and the cause of action accrued. Since he filed his claim in May, 1969, Mr. Berend was within the Texas Statute of Limitations requiring that a claim on a written obligation be

brought within four (4) years after the cause of action has accrued.

At the end of the hearing, Mr. Berend asked the Judge if the case could be filed in some other state where the corporation does business. The Court replied:

> Mr. Berend, I am not allowed to give legal advice. I was wondering a while ago why you did not file it in Missouri, but I am not allowed to give legal advice. (Transcript, p. 84).

The United States Court of Appeals for the Fifth Circuit put the matter on the Summary Calendar according to Rule 18 (set out in Appendix) and decided the appeal without a hearing. The Court did not discuss the issue of when the cause of action accrued. Relying on the District Court's assumption that the cause of action accrued in 1954, and without the benefit of argument on this issue, the Appellate Court concluded that the claim was barred by the Texas Statute of Limitations, Articles 5526 and 5527, Vernon's Annotated Texas Civil Statutes.

REASONS FOR ALLOWING THE WRIT

I. The Court of Appeals' Affirmation of the Dismissal of the Plaintiff's Claim Was an Erroneous Application of the Texas Statute of Limitations

The Statute of Limitations was erroneously applied by the lower courts to bar the Plaintiff's claim. In applying the Texas law, Arts. 5526, 5527, Vernon's Annotated Texas Civil Statutes, the breach of a written contract, the District Court ignored a recent Texas case, *Naylor* v. *Gutteridge*, 430 S.W. 2d 726 (Civ. App. 1968) ref. n.r.e., holding that the Plaintiff was not barred by the Texas Statute of Limitations. According to the Court, the Plaintiff had no cause of action until

it became clear that the Defendant did not intend to honor the terms of his letter. In that case, the Plaintiff had loaned money to the Defendant who stated in a letter that monthly payments would be increased in a couple of months to whatever amount the Plaintiff needed.

It was not until after the loan became due that the Plaintiff realized that the Defendant would not fulfill the promise to pay.

Similarly, the letter Berend received from J. F. Pritchard, on January 21, 1954, stated that the Company would settle with the Plaintiff "on the basis of our existing agreements and procedure." It was not until a letter was received from the Defendant company on October 13, 1966, which stated that the Company had no responsibility toward Mr. Berend, that Berend realized the Defendant did not intend to honor the terms of the earlier letter. The Plaintiff did not have a cause of action for breach of contract until the Defendant made it clear that it would not pay him for past services. Prior to the 1966 letter, the Plaintiff had reasonably relied on the statements of his employer for twenty-five (25) years that he would be compensated.

The Texas Statute of Limitations which the District Court applied to the Plaintiff's claim provides:

> There shall be commenced and prosecuted within four years after the cause of action shall have accrued . . .
>
> 1. Actions for debt where the indebtedness is evidence by or founded upon any contract in writing.
>
> Art. 5527, Vernon's Ann. Texas Civil Statutes.

Since the Plaintiff's cause of action did not arise until October 13, 1966, his claim should not have been barred by the four year statute of limitations.

Missouri law might also be applicable to the Plaintiff's claim since the home office of the Defendant corporation is in Kansas City, Missouri, and the contract was made in Missouri. The Missouri Statute of Limitations provides that actions on written contracts may be brought within ten (10) years after the cause of action has accrued. Missouri Rev. Stat., 516.110. Interpreting this provision, Missouri courts have stated that the cause of action does not accrue until the damage resulting from the breach of contract is sustained and is capable of ascertainment. *Chemical Workers Basic Union* v. *Arnold Savings Bank,* 411 S. W. 2d 159 (1966), See also Missouri Rev. Stat. 516.100.

The October 13, 1966 correspondence from J. F. Pritchard & Company notified Mr. Berend that the company would not honor the contractual obligations toward him. It was in October 1966, therefore, that Mr. Berend's damage was capable of ascertainment and his cause of action accrued. By filing his claim in May 1969, Mr. Berend was well within the ten (10) year statute of limitations on written contracts in Missouri. Thus, no matter which state's law is applied, the claim is not barred.

II. The Court Has a Duty to a Plaintiff Arguing on His Own Behalf To Assist in Framing His Pleadings and To Provide the Plaintiff With a Hearing on the Major Issues

The Plaintiff appeared in the U. S. District Court on his own behalf. Aware that Berend was not an attorney and that he had only an eighth grade education, the Court had a duty to assist the Plaintiff by inter-

preting his allegations in terms of statutes most favorable to his situation. In *Roberts* v. *Peppersack,* 256 F. Supp. 415, cert. denied, 389 U.S. 887 (1965), the Court recognized its responsibility to a Plaintiff appearing without counsel and stated that it had a duty to assist him. Despite the Plaintiff's failure to claim a statutory basis for his suit, the Court framed the Plaintiff's allegations in terms of the applicable statute, 42 U.S.C. § 1983, in order to make them the most favorable to the Plaintiff's situation.

In *Beckett* v. *Kearney,* 247 F. Supp. 219 (N.D. Ga. 1965) the Plaintiff was an inmate of a prison. The Court also recognized its responsibility to individuals representing themselves without counsel, stating:

> His petition does not bear a label, but it is the duty of this Court to give relief if demanded by the facts, regardless of the form of action.
>
> *Id.* at 219.

Berend did not receive this kind of assistance from the District Court. In fact, he was the victim of an erroneous application of the law. The Judge, instead of assisting the Plaintiff, neglected to give him a hearing on the major question of fact, which was when the breach of contract occurred. Despite Plaintiff's obvious ignorance of the technicalities of the Statute of Limitations, the Judge assumed that the breach of contract occurred in 1954 and automatically barred the claim under the Statute of Limitations. The Court of Appeals for the Fifth Circuit compounded the error by deciding the case without oral argument. While many cases may be appropriate for placing on the summary calendar, this one clearly was not. As a result, the appellate court relied on the almost incompre-

hensible pleadings of the Plaintiff and accepted without question the faulty and unexamined assumptions of the District Court. Neither Court gave the Plaintiff the opportunity to argue the issue of when the breach of contract occurred. This was the most crucial issue to the decision of whether the claim was barred by the Statute of Limitations.

At the very least, Berend should have been asked to argue that his cause of action did not accrue until 1966 and therefore was not barred by either the Texas or Missouri Statutes of Limitations.

Instead of assistance from the Courts, Berend received the response of the trial judge that he was "not allowed to give legal advice," and summary dismissal by the Court of Appeals. Our judicial system must be able to respond with more assistance than was provided in this case to an individual who attempts to recover his property without the benefit of counsel. See *Johnson* v. *Avery*, 391 U.S. —— (1969) (Douglas, J. concurring).

CONCLUSION

For the above and foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Fort Worth, Texas 76116

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

Memorandum Opinion

(Number and Title Omitted. Filed Sep 17, 1969)

This is another one of those pitiful cases where a man has become obsessed with the idea that he has been persecuted, and is giving vent to his feelings by busying himself with litgation which he thinks will afford relief for such persecution.

The plaintiff has filed and conducted this litigation without the aid of counsel. He is a sincere, intelligent person approximately 60 years of age. He got his formal education from parochial schools, and did not go to college; but he reached a position of high attainment and responsibility in a technical phase of the construction industry. He was a construction superintendent by the time he was 21 years of age. Early in his adult years, J. F. Pritchard & Company, one of the largest companies in the construction of industrial plants, subcontracted to him all of the construction of cooling towers and equipment in industrial plants which it had contracted to build throughout the United States, Canada and foreign countries. That relationship covered a period of years ending in 1954. During that time, he had as many as four to five hundred men working under his supervision and an average of at least 15 cooling tower projects under construction.

These two suits were instituted by the filing of complaints in the form of letters, with numerous exhibits attached. The earlier suit was filed May 29, 1969, against J. F. Pritchard & Company and "Mr. John F. Pritchard, Jr., President" for $96,822.25, plus interest from 1954. The subsequent suit was filed on July 1, 1969, against those same two defendants and also against J. F. Pritchard &

Company of California (the name of which had subsequently been changed to Pritchard Products Corporation) and Continental Hotel, of Kansas City, Missouri, for the sum of $[illegible]00,000,000.00.

While there was some difficulty in understanding from the written instruments just what the plaintiff's cause of action was, the matter was finally cleared up through plaintiff's answers to questions by the Court and by statements in his oral argument. There is no question whatever about the fact that plaintiff's claims arose out of certain transactions in Kansas City, Mo., in 1954, which the plaintiff in his argument called the "Continental Hotel affair."[1] The plaintiff says that in 1954 he went to Kansas City to discuss with Mr. John F. Pritchard, Sr., the continuation of their business relationship. His health was failing[2] and he could no longer actively supervise the subcontract work, but he thought he had built up an organization that could do the work effectively without his active participation.[3] The plaintiff and his wife registered at the Continental Hotel and stayed there several days without his ever being able to see Mr. Pritchard. Both of them were in such condition of health that they remained in the hotel all the time they were there. When the plaintiff notified J. F. Pritchard & Company he was at the hotel, the company sent a Mr. Carl Johnson to see him. The

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[1] This label was evidently arrived at from the fact that J. F. Pritchard & Company notified plaintiff while he was at the Continental Hotel in Kansas City, Mo., that it would not continue to do business with him under the changed conditions he desired.

[2] Mr. Berend stated that he had sustained some injuries and was having some emotional problems.

[3] The following is quoted from the proceedings of the hearing:

> MR. BEREND: "... My point, of course in going to Kansas City to discuss it with Mr. Pritchard, is that we could continue—I could continue, even though I wouldn't have been personally able, but I had able men that were superintendents and also my assistants to me, which could have carried on."

plaintiff refused to talk to Mr. Johnson or anyone else connected with the company except Mr. Pritchard. He made twelve calls to the company office in his persistence to see Mr. Pritchard, but they availed him nothing. On January 9, 1954, Mr. Johnson delivered to plaintiff a letter saying that the company could no longer continue the business relationship it had had with him. While there is no intimation of any obligation on the part of J. F. Pritchard & Company to continue to subcontract its cooling tower and equipment construction jobs to plaintiff, he nevertheless now claims damages as the result of such discontinuance, and says that his inability to continue such subcontract work also cost him some property he owned in Fort Worth which he had used as headquarters for his business.

The plaintiff sued the company he thought operated the hotel on the ground that Mr. Pritchard might have left a call for him and the hotel failed to deliver it to him.

John F. Pritchard, Jr., is made a party defendant; but there is no intimation of any action on his part that could possibly give rise to liability to the plaintiff.

All of the defendants in both cases filed their motions to dismiss the cases for failure to state a claim upon which relief could be granted against them, taking the position that the matters referred to in the plaintiff's "pleadings" in both cases occurred more than two and four years prior to the filing of such actions, and that any cause of action arising out of any of such matters would be barred by the provisions of the applicable statutes of limitations. The defendant, Hotel Continental Company, also urged in its motion, which was supported by affidavit not in any way controverted by the plaintiff, that it is a Missouri corporation, incorporated in such State on December 12, 1967, and was not even in existence in 1954, when the matters complained of by the plaintiff occurred; and that the Continental Hotel was owned and operated prior to December, 1967 by others in no way connected with the defendant Hotel Continental Company.

While the "Complaints" in both cases were attacked, and might well have been dismissed, upon the ground that they did not satisfy the requirements of Rule 8(a) of the Federal Rules of Civil Procedure, the Court ordered that a hearing be held on August 12, 1969 on all motions pending in both cases, at which time the plaintiff appeared and was accorded a full and complete hearing lasting approximately two hours. The plaintiff advised the Court that the same transaction was involved in both of the above suits and that there was no reason why the two suits should not be consolidated, and the attorneys for the defendants did not object to the consolidation of such suits. It appeared to the Court that such action was appropriate and the two suits were ordered consolidated.

After the motion of the defendant, Hotel Continental Company, for dismissal was presented to the Court, the plaintiff stated that he thought such motion was well taken and should be granted and that such defendant should be dismissed from the case.

The Court then held a full and complete hearing to determine the nature of the plaintiff's claims and complaints against the other defendants in the consolidated cases and permitted the plaintiff to make all of the statements he desired in this connection. The main offices of J. F. Pritchard & Company, a Missouri corporation, and of Pritchard Products Corporation, a California Corporation (formerly J. F. Pritchard & Company of California) are in Kansas City, Missouri, but they have maintained offices in Texas at all times material to this suit. The plaintiff stated that their biggest operation was carried on in Texas, where their Houston office, which had been maintained there continuously since 1937, is one of their main offices.

The letter of January 9, 1954, from J. F. Pritchard & Company to plaintiff, which was delivered to him at the Continental Hotel by Mr. Johnson, reads:

> "I have discussed your proposed agreement with Mr. Pritchard and Mr. Lyon and we are all in agreement

that, while we will be glad to have you figure any erection work we might require, we cannot consider your proposition as our sole means of cooling tower erection. Therefore, we must continue with our own erection department.

"In our discussion today you advised that you intend to leave the Company and enter business for yourself. In view of your decision, I suggest your resignation become effective the first of the month following substantial completion of all jobs now under construction as set forth in paragraph 3 of your letter of December 31, 1953 to Mr. Lyon with the exception of CTK-4624, the Texas Company, Port Arthur, Texas, Pan tests, if required at a later date, will be handled from here. Your present bonus arrangement with the company will remain in effect on all jobs now under construction as of this date with the exception of CTK-4624 which is just now in the unloading and hauling state and will probably not be completed for another three months. CTK-4624 and any other jobs not started as of this date, as per your report of December 31, 1953 will be directed from Kansas City.

"Please advise all erection superintendents now on jobs under construction to report to Kansas City to me by telephone for further instructions upon completion of their job. They are to work under your direction in the meantime. Will you also kindly advise all erection superintendents now working as assistants or as carpenters on jobs, or not now presently assigned, to report to me immediately by phone at Kansas City for further instructions. We have not yet received the home or permanent addresses of the erectors from you. Would you please forward them to me immediately.

"Instruction will be sent to you within the next few days for disposition of inventory, office fixtures and

equipment, and any other Company property now on hand in Fort Worth.

"In view of your resignation, the erection department will be moved back to Kansas City. Will you please advise Betty, Joe Berend, Frances Alexander, and any other employee you may now have on your payroll in Fort Worth, who are not erectors, that their employment with the Company will terminate on Friday, January 29, 1954 unless you prefer to terminate sooner and you will not need their services in handling the remaining work to be done.

"I would appreciate your handling the payrolls for jobs now under construction, except CTK-4624, and your office personnel as you are until the jobs are completed and the personnel terminated. Any new payrolls will be handled by Kansas City.

"Your cooperation in effecting this change will be sincerely appreciated so as to cause no inconvenience to our customers.

"In closing, Jewel, let me say that it has been a pleasure to work with you in this cooling tower game. You have done an excellent job of directing our cooling tower erection, and, while I am sorry to see you leave, I want to wish you much success in your new undertaking."

The plaintiff's theory is that the foregoing letter operated to steal his Fort Worth, Texas operations and deprived him of his long standing subcontract arrangement with J. F. Pritchard & Company, causing him to suffer the damage for which he sued in these two cases. He bases his causes of action upon such letter.

The plaintiff checked out of the Continental Hotel room on January 9, 1954 and returned to Fort Worth where he received the following letter dated February 4, 1954 from

P. S. Lyon, Secretary-Treasurer of J. F. Pritchard & Company:

> "I found your note of January 14, 1954 on Mr. Pritchard's desk. He is in California this week but I thought I should write you where we stand at the moment.
>
> "I am attaching a copy of Mr. Pritchard's letter of January 21, which you may not have received. In accordance with this letter we expect to review the existing agreements and develop the necessary figures. Unfortunately, this has come at a time when we are closing out our records for last year, our Public Accountants are all over the place in connection with their annual audit, and we are faced with various tax deadlines. However, we have begun work on your problem and hope to have something ready for Mr. Pritchard within the next two or three weeks.'"

Attached to Mr. Lyon's letter was a letter to the plaintiff from J. F. Pritchard dated January 21, 1954 and reading as follows:

> "In reply to your various letters and discussions, I want to say that I regret very much that we could not get together on any mutually suitable basis, and I am sorry to hear that you are leaving to follow your personal plans.
>
> "All of our negotiations have been on the basis of revising our past procedure and accordingly if there is nothing that can be worked out, I do not see any possible procedure except to settle for past services on the basis of our existing agreements and procedure.
>
> "It may be a little while before we have an idea of what this will amount to, but I can assure you that in figuring this out our inclination would be to be as reasonable as possible in view of your long and satisfactory service with our company.

"Just as soon as we have a definite idea of what this will be shaping up to, we will let you know further, and we also would be willing to advance a portion at any time that we can determine we are sure of it."

Within two months after the plaintiff returned to Fort Worth in January, 1954, J. F. Pritchard & Company moved all of the equipment previously used in Fort Worth away from there, and the plaintiff terminated his relationship with the defendant company. He did write a considerable number of letters to J. F. Pritchard asking for an explanation and for money he considered was due him, but these letters were never answered until he received the letter dated October 13, 1966, a copy of which is part of his "Complaint" in both cases, reading as follows:

"Dear Mr. Berend:

"It is apparent that you are not aware of the death of Mr. J. F. Pritchard on May 3, 1966. His loss, like that of Mr. H. Arthur Martin in February, saddened those of us who knew and worked under his direction for so many years.

"Your letters have been reviewed by responsible officials of the Company and by its counsel. Based upon advice of counsel, it is the opinion of the Management that the Company has no responsibility in connection with any of the matters referred to in your correspondence and accordingly, the Company is closing its file.

"Yours very truly,

"J. F. PRITCHARD & Co.
"/s/ R. W. EATON
"R. W. Eaton
"Manager of Personnel"

The plaintiff does not contend that the defendants misled him by any promises during this period from 1954 to October 13, 1966, but stated:

> "In fact, Pritchard, they just finally got to the point that they marked 'Refused' on the letters, you know, and sent them back. The letters would come back."

J. F. Pritchard, Jr. had nothing to do with any of these event, and was apparently sued as "Mr. J. F. Pritchard, Jr., President" because plaintiff thought he held that office with J. F. Pritchard & Company. However, the uncontroverted affidavit of J. F. Pritchard, Jr., filed in both cases discloses that he is not an officer, director nor employee of such company.

The Court is of the opinion that these cases could be dismissed for failure to state a claim on which relief could be granted, as there is no indication that J. F. Pritchard & Company was under any legal obligation to continue to subcontract any of its construction business to plaintiff. Likewise, no breach of duty to plaintiff appears in regard to the defendants other than J. F. Pritchard & Company. However, there can be no question about the fact that even if plaintiff had a cause of action, it is barred by the Texas statutes of limitations. Art. 5526, Vernon's Ann. Tex. Civ. Statutes, requires that actions based on obligations not in writing "shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward."[4] Under Art. 5527, actions based upon breach of written obligations must be brought within four years after they accrue. The plaintiff waited fifteen years—from 1954 to 1969—to bring his actions; so they should be dismissed on the ground that they are

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[4] Some types of actions, such as malicious prosecution, libel, slander, seduction, breach of promise, are required to be brought within one year (Art. 5524), but the one year statute has no application here.

barred by the statutes of limitations. Judgment will be entered accordingly.

Signed, September 17, 1969.

/s/ LEO BREWSTER
Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28651
Summary Calendar

JEWEL G. BEREND, *Plaintiff-Appellant,*

versus

J. F. PRITCHARD & COMPANY, ET AL., *Defendants-Appellees*

Appeal from the United States District Court for the Northern District of Texas

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(March 9, 1970)

Before BROWN, Chief Judge, MORGAN and CLARK, Circuit Judges.

PER CURIAM: Pursuant to Rule 18 of the Rules of this Court, we have concluded on the merits that this case is of such character as not to justify oral argument and have directed the clerk to place the case on the Summary Calendar and to notify the parties in writing. See *Murphy* v. *Houma Well Service*, 5 Cir., 1969, 409 F. 2d 804, Part I; and *Huth* v. *Southern Pacific Company*, 5 Cir., 1969, —— F. 2d ——, Part I [No. 27,439, Oct. 7, 1969].

The nature of this cause is somewhat obscure, but it appears to be one in tort for conversion of property or possibly breach of contract. The complaint here contains no allegation of fact showing any legal right which belonged to complainant and which the appellees breached, with damages resulting therefrom. Under the most liberal interpretation of the Federal Rules of Civil Procedure, the appellant failed to allege a cause of action against appellees. *Dorsey* v. *State Farm Insurance Co.*, 5 Cir., 1961, 294 F. 2d 678.

However, assuming a cause of action once existed and was alleged, the complainant waited fifteen years—from 1954 to 1969—to bring his action, and Texas Statutes of Limitations, Article 5526 and Article 5527,[1] Vernon's Annotated Texas Civil Statutes, would prevent recovery.

The District Court did not err in dismissing the actions.

JUDGMENT AFFIRMED.

---

[1] *Article 5526, Vernon's Texas Civil Statutes:*

There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contracting writing.

5. Actions upon stated or open accounts, other than such mutual and current actions as concern the trade of merchandise between merchant and merchant, their factors or agents. In all accounts, except those between merchant and merchant, as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall be particularly specified, and limitation shall run against each

Court Rules

United States Court of Appeals for the Fifth Circuit

* * * * *

Rule 18.

Summary Calendar

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

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item from the date of such delivery, unless otherwise specially contracted, Acts 1841, p. 163; G.L. vol. 2, page 627.

6. Action for injury done to the person of another.

7. Action for injury done to the person of another where death ensued from such injury and the cause of action shall be considered as having accrued at the death of the party injured. Acts 1897, p. 12; Acts 1841, p. 163; Acts 1852, p. 128; P.D. 4604; G.L. vol. 10, p. 1066; G.L. vol. 2, p. 627; G.L. vol. 3, p. 1006.

8. Actions of forcible entry and forcible detainer.

Article 5527, Vernon's Texas Civil Statutes:

There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

2. Actions for the penalty or for damages on the penal clause of a bond to convey real estate.

3. Actions by one partner against his co-partner for a settlement of the partnership accounts, or upon mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents; and the cause of action shall be considered as having accrued on a cessation of the dealing in which they were interested together. Acts 1841, p. 163; P.D. 4604; G.L. vol. 2, p. 627.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

* * * * *

J. F. PRITCHARD & COMPANY
908 GRAND AVENUE
KANSAS CITY 6, MISSOURI

August 4, 1947

R. C. Kelly
P. S. Lyon

Cooling Tower Erector's Bonus
(Agreements—Sub-contracts)

$96,822.25, due since 1954, as per this agreements & Investments (Agreements-Sub-contracts)

J. G. Berend's Agreements & Investments, covered all States U.S.A.-CANADA-MEXICO-FOREIGN-Jobs

Dear Bud:

As you know we have an *arrangement with Jewel Berend* to pay him a bonus based on the savings between the cost of erection and the estimated cost of erection of individual towers. A report is made at the end of each quarter as to how he stands on those towers on which erection was completed during the quarter.

In attempting to prepare the report as of June 30 for the second quarter, the Accounting Department reports a snag of which I was unaware. The estimated erection allowance, job by job, has always been furnished by the Cooling Tower Department. Apparently, sometime after Bob Pabodie left, this was discontinued. It appears that up until this quarter, we have been erecting jobs taken before Bob left, and it was only this time that jobs turned up on which no erection allowance figures had been submitted.

Will you, accordingly, please have someone bring these figures up to date and submit them to the Accounting Department at the earliest possible time. We will simply have to let the report go until the figures are available. In preparing them, it is hardly proper that you have any information on the actual costs, and since it will ultimately be necessary to have the figures for all jobs, there is no point in giving you a list of the specific jobs involved on the June 30 report. We are, therefore, submitting no information with this letter other than the fact of missing essential information.

I am sorry I could not discuss this with you personally. As I will be gone on my vacation when you return from yours and as the matter needs immediate attention, I thought it best to set it up in a memo.

Yours very truly,

P.S.L.
Secretary-Treasurer

PSL/md
cc: J. G. Berend
H. G. Kraft

C O P Y

March 24, 1950

H. G. Kraft
P. S. Lyon
Berend Bonus Agreement

J. G. Berend's Agreements & Investments, covered all States U.S.A.-CANADA-MEXICO-FOREIGN-Jobs

$96,822.25, due since 1954 as per this agreements & Investments

At a conference this morning attended by *J. F. Pritchard, R. C. Kelly, J. G. Berend* and myself the following points were discussed and agreed upon:

1. For the present we will continue to omit underruns or overruns on steel tower erection from calculation of erection savings. This is subject to change whenever the design of such towers becomes stabilized.
2. Cost plus erection jobs will also be eliminated from the savings calculation.
3. The schedule of erection savings for 1949 is to be increased per the attached notes to reflect a total savings in the amount of $14,810.83, and Mr. Berend's bonus increased to 50% of this figure, or $7,405.42.

Very truly yours,

PSL

Secretary Treasurer

All of J. G. Berend operations, STOLEN, in U.S.A.-CANADA-MEXICO-FOREIGN, were financed By J. G. Berend personal monies, Properties-Payrolls-Expenses, etc. All employees were hired and Personally Trained by J. G. Berend.

PSLyon:f

cc: J. G. Berend
R. C. Kelly
R. W. Eaton
Dean Adams

C O P Y

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 237

JEWEL G. BEREND,
Petitioner,

v.

J. F. PRITCHARD & CO.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1669

JEWEL G. BEREND,
Petitioner,

v.

J. F. PRITCHARD & CO.,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Memorandum Opinion of the U.S. District Court for the Northern District of Texas (Fort Worth Division) and the *per curiam* opinion of the U.S. Court of Appeals for the Fifth Circuit, 422 F.2d 1247, are reproduced in the appendix to the petition for writ of certiorari (Petn. 1a-11a).

JURISDICTION

The *per curiam* opinion of the U.S. Court of Appeals for the Fifth Circuit was entered on March 9, 1970. The petition for writ of certiorari was filed by petitioner in this Court on June 5, 1970. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the wrongful-discharge type claims of petitioner, respondent's employee operating as a subcontractor in constructing cooling towers and equipment for industrial plants built by respondent, were properly dismissed by the district court as barred by the Texas statutes of limitations and, upon the court of appeals' affirmance, for the additional reason that petitioner failed to allege a cause of action.

STATUTES INVOLVED

The pertinent parts of the Texas statutes of limitations, Articles 5526 and 5527, Vernon's Annotated Texas Civil Statutes, are set forth in the *per curiam* opinion of the Court of Appeals below and appear in the appendix to the petition for certiorari (Petn. 11a-12a).

STATEMENT

With its main office in Kansas City, Missouri (T. 44), respondent J. F. Pritchard & Co. designs, engineers and constructs plants and equipment for chemical, petroleum, gas, power and other heavy industries (T. 7, 10), with operations in California (T. 77), Texas (T. 83) and elsewhere in the United States, Canada and abroad (T. 76; Petn. 1a). For some years prior to 1954, petitioner Jewel G. Berend, respondent's employee who headquartered in Ft. Worth,

Texas (T. 4-5), handled as a subcontractor the construction of cooling towers and equipment in such industrial plants (T. 22, 76-77; Petn. 1a).[1]

In 1954 when he stated he was disabled and unable to do physical work any more (T. 53, 55-56, 78), petitioner came to Kansas City to discuss his Fort Worth operations with Mr. John F. Pritchard, Sr., respondent's president (T. 58-61; Petn. 2a). Petitioner stayed with his wife at the Continental Hotel on January 8 and 9, 1954 (T. 55-61, 118) and attempted unsuccessfully to contact and meet with Mr. Pritchard (T. 60-61, Petn. 2a). Respondent's Mr. Carl Johnson did come to petitioner's hotel room on January 8 (T. 60; Petn. 2a-3a), and the next day delivered a letter to petitioner dated January 9, 1954 (T. 61).

Among other things, Mr. Johnson's letter stated that "I have discussed your proposed agreement with Mr. Pritchard and Mr. Lyon [then respondent's secretary-treasurer]"; that "while we will be glad to have you figure any erection work we might require, we cannot consider your proposition as our sole means of cooling tower erection" but "must continue with our own erection department"; that in view of your decision "to leave the Company and enter business for yourself," your resignation should "become effective the first of the month following substantial completion of all jobs now under construction as set forth in paragraph 3 of your letter of December 31, 1953 . . ."; and that "Your present bonus arrangement with the company will remain in effect on all jobs now under construction . . . ."[2] There followed various requests and instruc-

1. The Transcript filed in this Court is believed to have pages in the same order (although non-chronological) as the Appendix in the U.S. Court of Appeals below which is cited "T." Petitioner's certiorari petition is cited "Petn."

2. As to the "bonus arrangement," at the district court hearing on respondent's motion to dismiss, petitioner stated that under his arrangement with respondent "we would split the profit fifty-fifty" on the cooling equipment he constructed "the same as a subcontractor" for respondent (T. 74-75).

tions regarding the turning over of work and the handling of personnel, including the statement that "In view of your resignation, the erection department will be moved back to Kansas City." The letter closed with Mr. Johnson's comment that "You have done an excellent job of directing our cooling tower erection, and, while I am sorry to see you leave, I want to wish you much success in your new undertaking." (T. 64-66; Petn. 4a-6a.)

Petitioner checked out of the Continental Hotel, returned to Fort Worth and thereafter received a letter from Mr. Pritchard dated January 21, 1954 in which he stated that "I regret very much that we could not get together on any mutually suitable basis"; that "I am sorry to hear that you are leaving to follow your personal plans"; that "if there is nothing that can be worked out, I do not see any possible procedure except to settle for past services on the basis of our existing agreement and procedure"; that "It may be a little while before we have an idea of what this will amount to, but I can assure you that in figuring this out our inclination would be to be as reasonable as possible in view of your long and satisfactory services with our company"; and that "Just as soon as we have a definite idea of what this will be shaping up to, we will let you know further . . . " (T. 68-69; Petn. 7a-8a.)

Petitioner thereafter turned his operations over to respondent "because, in the first place, due to my health . . . . And since that time I was the same as bedfast for about three years getting over the ulcers, then due to that trouble and my back and my leg . . . , I haven't done any active work at all." (T. 70). In his statements at the District Court's hearing on respondent's motion to dismiss, petitioner also said that respondent would not negotiate further, would not answer petitioner's letters and did not pay what he considered was owed him (T. 32, 80; Petn.

8a). Almost thirteen years after his trip to Kansas City and termination of his subcontract work, petitioner received respondent's letter dated October 13, 1966 advising that "the Company has no responsibility in connection with any of the matters referred to in your correspondence . . . ." (T. 10, 32-33, 80, 155; Petn. 8a.)

Without the aid of counsel, petitioner filed two suits against respondent and others in the U.S. District Court for the Northern District of Texas (Fort Worth Division) (T. 2-11, 87-97). In the one filed May 29, 1969, petitioner claimed $96,822.25 plus interest from 1954, a total of $256,822.25 (T. 2; Petn. 1a). In the second filed July 1, 1969, where he also joined respondent's former affiliate, J. F. Pritchard & Company of California, and the Continental Hotel, petitioner claimed $100,000,000.00 (T. 87; Petn. 1a-2a). Responsive motions to dismiss were filed (T. 12-20, 98-115). Both suits involved the same transaction and accordingly were consolidated (T. 38-39; Petn. 4a).

The district court observed that "there was some difficulty in understanding from the written instruments just what the plaintiff's cause of action was" (T. 23; Petn. 2a), and "held a full and complete hearing to determine the nature of the plaintiff's claims and complaints . . ." at the time the motions to dismiss were argued (T. 26; Petn. 4a). The so-called "Continental Hotel affair" was the gravamen of petitioner's complaint (T. 23, 53-55; Petn. 2a), the district court stating—as petitioner himself orally asserted (T. 62-63, 70-71)—that petitioner's "theory" is that the January 9, 1954 letter delivered to him at his Kansas City hotel room "operated to steal his Fort Worth, Texas operations and deprive him of his long standing subcontract arrangement with J. F. Pritchard & Company, caus-

ing him to suffer the damage for which he sued in these two cases" (T. 30; Petn. 6a).[3]

At the conclusion of the hearing, the district court sustained respondent's motion to dismiss (T. 12-14) (the Continental Hotel having earlier been dismissed (T. 50-51)) and said that any cause of action was barred by the two-year and four-year Texas statutes of limitations. In its Memorandum Opinion subsequently filed (T. 21-35; Petn. 1a-10a), the district court stated that "these cases could be dismissed for failure to state a claim on which relief could be granted, as there is no indication that J. F. Pritchard & Company was under any legal obligation to continue to subcontract any of its construction business to plaintiff"; and that "even if plaintiff had a cause of action, it is barred by the Texas statutes of limitations." (T. 34; Petn. 9a.)

On appeal, the U.S. Court of Appeals for the Fifth Circuit affirmed *per curiam*, holding as follows:

> "The nature of this cause is somewhat obscure, but it appears to be one in tort for conversion of property or possibly breach of contract. The complaint here contains no allegation of fact showing any legal right which belonged to complainant and which the appellees breached, with damages result-

---

3. The colloquy between the district court and petitioner included the following:

> "THE COURT: What is the—is the whole suit based—is your whole suit against Pritchard and his corporations based on what you call the Continental Hotel room affair?
>
> MR. BEREND: Yes, it really is.
>
> THE COURT: All right, it goes back—it depends—
>
> MR. BEREND: —It all goes back, because I went—they asked me to come to Kansas City, Missouri, to negotiate the Fort Worth, Texas operation.
>
> THE COURT: And that is when you say they took advantage of your and violated your rights?.
>
> MR. BEREND: Yes, sir. . . ." (T. 55.)

ing therefrom. Under the most liberal interpretation of the Federal Rules of Civil Procedure, the appellant failed to allege a cause of action against appellees. *Dorsey* v. *State Farm Insurance Co.*, 5 Cir., 1961, 294 F.2d 678.

However, assuming a cause of action once existed and was alleged, the complainant waited fifteen years—from 1954 to 1969—to bring his action, and Texas Statutes of Limitations, Article 5526 and Article 5527, Vernon's Annotated Texas Civil Statutes, would prevent recovery.

The District Court did not err in dismissing the actions." (Petn. 10a-11a.)

REASONS FOR DENYING THE WRIT

1. The decision below is not appropriate for review by this Court.

As readily revealed by even a cursory reading of the district court's Memorandum Opinion (Petn. 1a-10a), petitioner's brief and the Statement herein, this case involves special and unique facts and a determination under State statutes of limitations. There is no question of general importance or broad impact, no Constitutional or federal statute involved and no conflict among the decisions to be resolved. Clearly, this case is not one for review by this Court.

2. The decisions of the District Court and Court of Appeals are correct.

After trying to ferret out the basis of petitioner's exorbitant claims at the hearing on respondent's motion to dismiss,[4] the district court gave petitioner an opportunity to

4. Even petitioner's own certiorari petition alludes to "the almost incomprehensible pleadings of the Plaintiff . . . ." (Petn. 10-11).

be fully heard and to present anything he desired.[5] The trial judge then commented that "if I ever saw a case which was barred by the statutes of limitations, it is these two" (T. 84). And in its Memorandum Opinion, the court stated that while "these cases could be dismissed for failure to state a claim on which relief could be granted, . . . even if plaintiff had a cause of action, it is barred by the Texas statutes of limitations." (T. 34; Petn. 9a.)

Similarly, in a concise *per curiam* opinion which understandably was entered after concluding "that this case is of such character as not to justify oral argument" (Petn. 10a), the Court of Appeals for the Fifth Circuit divined the "somewhat obscure" nature of petitioner's cause as "appear[ing] to be one in tort for conversion of property or possibly breach of contract" (Petn. 11a). The court below then quickly concluded that "Under the most liberal interpretation of the Federal Rules of Civil Procedure, the appellant failed to allege a cause of action" and that even "assuming a cause of action once existed and was alleged, the complainant waited fifteen years—from 1954 to 1969—to bring his action, and the Texas Statutes of Limitations . . . would prevent recovery." (Petn. 11a.)

Petitioner urges (Petn. 7-8) that the statutes of limitations were erroneously applied by the courts below and that a 1968 Texas case, *Naylor* v. *Gutteridge*, 430 S.W.2d 726 (Texas Civ. App. 1968) was ignored. That case involved a suit by an incompetent's guardians for monies she

5. After beginning with the statement "Mr. Berend, tell me what your case is about" (T. 51), the district court judge questioned the petitioner at length (T. 51-83) and concluded by asking whether there was "Anything else you would like to say?" (T. 83). Compare, *e.g.*, *Roberts* v. *Peppersack*, 256 F. Supp. 415 (D. Md. 1966), *cert. denied*, 389 U.S. 877 (1967), and *Beckett* v. *Kearney*, 247 F. Supp. 219 (N.D. Ga. 1965), cited by petitioner (Petn. 10), which are largely inapposite here because they involved unlearned and confined inmates of penal institutions.

loaned to defendants who claimed repayment of some loans made in 1964 and raised the statute of limitations as to the claims for loans made prior to 1964. As to a particular $2,500.00 check dated October 20, 1964, although defendants had not pleaded the statute and had admitted the debt, the court commented that even if the Texas two-year statute of limitations on oral contracts had been sufficiently pleaded as a defense, the statute was tolled upon the April 26, 1966 adjudication of the ward's incompetency under an applicable tolling statute. It is true that the court, by way of *dictum,* additionally commented that there was "no cause of action until it became clear that defendant Naylor did not intend to honor the terms of his letter" dated October 8, 1964 which, in asking for the loan, promised increased monthly payments beginning "in a couple of months." *Id.* at 734. But suit was filed on December 6, 1966, approximately two years and seven weeks after the loan by check was made, and the court said that "It is reasonable to presume, in view of Naylor's promise . . . , that the obligation was carried past December of 1964, which would take it out of the two-year statute." *Ibid.*

The instant situation involving petitioner's belated suits is clearly distinguishable as he waited over fifteen years between the 1954 date of "the Continental Hotel affair" with its related correspondence and the filing of his suits in 1969. Certainly it is not reasonable here, solely because of respondent's "we will let you know further" letter of January 21, 1954 (see Statement herein, *supra,* at p. 4), to presume that any obligation of respondent carried on for fifteen years to the time petitioner filed suit.

It should be emphasized that there is no evidence in the record to support petitioner's assertions (Petn. 3, 5) that

he had "written contracts" with respondent. There was, of course, certain correspondence between the parties, but there is nothing to show that there was any written agreement between them regarding petitioner's rather unique employment under which he operated like a subcontractor. Accordingly, it is the Texas two-year statute of limitations which is really applicable here, Article 5526, Vernon's Texas Civil Statutes, not the four-year statute, Article 5527, which relates to "Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing" (Petn. 12a).[6]

Furthermore, it makes no difference whether petitioner's obscure cause of action is, as the court of appeals put it, apparently "one in tort for conversion of property or possibly breach of contract" (Petn. 11a). In any event the two-year statute is applicable, respondent submits, because after two years Article 5526 bars not only "Actions for debt where the indebtedness is not evidenced by a contract in writing," Article 5526, para. 4, but also "Actions of trespass for injury done to the estate or the property of another," "Actions for detaining the personal property of another, and for converting such property to one's own use," and "Actions for taking or carrying away the goods and chattels of another," Article 5526, at paras. 1, 2 and 3 (Petn. 11a). In short, if petitioner stated any cause of action at

6. Petitioner apparently endeavors to raise such a written contract by including in the appendix to his certiorari petition certain interoffice communications of respondent regarding its "arrangement" with petitioner and a conference with him at which certain things were "discussed and agreed upon." (Petn. 13a-15a). These memoranda are not in the transcript before this Court, and if petitioner is going outside the record in an effort to construct some sort of "written contract," he should likewise acknowledge—what also is admittedly not in the transcript—that on September 10, 1954, approximately eight months after "the Continental Hotel affair" and ensuing correspondence, respondent issued its check No. 132254 to petitioner in the amount of $4,000.00 which was endorsed "In full settlement of any and all claims which J. F. Pritchard and Company may have on J. G. Berend or Berend on Pritchard," signed by both parties and paid.

all, which respondent denies consistent with the holdings below, he at best "almost incomprehensibl[y]" pleaded an action coming within some proscribed part of the foregoing two-year statute.

Nor is petitioner's reliance upon respondent's October 13, 1966 letter (see Statement herein, *supra,* at p. 5), of any real avail to him. This was the one, almost thirteen years after "the Hotel Continental affair" and related correspondence, in which respondent told petitioner that "the Company has no responsibility in connection with any of [petitioner's] matters" and "is closing its file," and with which petitioner tries unconvincingly to link up respondent's January 21, 1954 letter stating that "just as soon as we have a definite idea of what this will be shaping up to, we will let you know further" (Petn. 8a, and see Statement herein, *supra,* at p. 4.) Tenuously tying together these two communications of almost thirteen years apart, petitioner astonishingly argues that he "did not have a cause of action for breach of contract until the respondent made it clear that it would not pay him for past services" (Petn. 8).

Clearly, at the time petitioner came to Kansas City and immediately thereafter, respondent made its position known to petitioner by way of written communications to him. This was in January of 1954. It is not only inconsistent but wholly unpersuasive for petitioner to now urge that, during the almost thirteen years until he received the 1966 letter, he "reasonably relied" upon respondent paying him, in view of respondent's total failure—petitioner said below (T. 32, 80; Petn. 8a)—to negotiate further or answer petitioner's letters. In any event, quite importantly, more than a two-year period elapsed between respondent's October 13, 1966 letter (at which time, even under petitioner's unconvincing view, his cause of action accrued) and the

May 29, 1969 filing of petitioner's first suit. Under the two-year limitation of Article 5526, accordingly, petitioner's actions were clearly barred by the Texas statute of limitations.

Petitioner also asserts that "Missouri law might also be applicable to the Plaintiff's claim" and alludes to Section 516.110 of the 1959 Missouri Revised Statutes, the ten-year limitations statute for actions on written contracts. (Petn. 9.) As already indicated, however, despite petitioner's bare references thereto, there is nothing in the record to support a "written contract" between the parties. At most under a Missouri contract approach, therefore, Section 516.120(1) of the Missouri Statutes would be applicable, as this prohibits actions upon oral contracts after five years.

As to petitioner's asserted reliance upon expecting to be paid until he received respondent's 1966 letter, it is well established in Missouri that if petitioner had any contractual cause of action, it accrued—at the latest—within a reasonable time after the "Hotel Continental affair" and related correspondence, and certainly was long barred even five years before petitioner filed suit in 1969. *E.g., Bisesi* v. *Farm & Home Savings & Loan Ass'n of Missouri,* 78 S.W.2d 871, 874 (St.L. Ct. of App. 1935) ("In the case before us no definite time was set for the delivery of the certificate to plaintiff by defendant, and in this situation it is ordinarily presumed that a reasonable time is intended, and limitation begins to run after such reasonable time.").

As far as any tort claim under Missouri law is concerned, Missouri's Section 516.120 also sets forth a five-year limitation for trespass and conversion actions, and thus any such cause based upon the 1954 "Continental Hotel affair" and related correspondence which allegedly

"operated to steal [petitioner's] Fort Worth, Texas operations" (T. 30; Petn. 6a) was likewise long barred by 1969. *E.g., Chemical Workers Basic Union* v. *Arnold Savings Bank*, 411 S.W.2d 159, 163 (Mo. Sup. Ct. 1966) ("Clearly, in this case, plaintiff's action is not 'upon any writing * * * for the payment of money' but for conversion and the five-year statute of limitations applies. . . . . Since this action was barred by the five-year statute of limitations, the court should have directed a verdict for defendant . . . ."). This case also emphasizes the need to exercise "reasonable diligence" to take action within the period of limitations *Id.* 165. Interestingly, this case is cited by petitioner in his brief (Petn. 9).

Furthermore, and quite important to possible application of Missouri statutes there is the fact that Texas does not have a so-called borrowing statute; thus, where a cause of action arises in another state whose statute of limitations exceeds that of Texas and the suit is brought in Texas, the statute of limitations of Texas governs and will be applied. *Hobbs* v. *Hajecate*, 374 S.W.2d 351 (Texas Civ. App. 1964). In Texas, statutes of limitations are viewed as matters of procedural rather than substantive law, and the limiting statute of the forum prevails. *Evers* v. *Powell*, 238 F. Supp. 787, 788 (S.D. Texas, 1964), aff'd., 342 F.2d 46 (5th Cir. 1965).

The district court sat in this diversity case as another Texas court and was required to decide it in the same manner as would a Texas court. *Evers* v. *Powell, supra.* Under Texas law its own statutes of limitation would apply, rather than those of Missouri. As petitioner sued in Texas, that state was the forum, and the district court correctly applied the forum statutes in determining that petitioner failed to bring his actions within the allowable Texas limitation period. The court of appeals correctly affirmed by applying the Texas statutes

CONCLUSION

In conclusion, it is worth pointing out what the district court stated at the the outset of its Memorandum Opinion:

> "This is another one of those pitiful cases where a man has become obsessed with the idea that he has been persecuted, and is giving vent to his feelings by busying himself with litigation which he thinks will afford relief for such persecution." (Petn. 1a.)

It is time for such litigation to come to an end.

For the reasons stated, the petition for writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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June 29, 1970

FILED
APR 22 1971
E. ROBERT SEAVER, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 237

JEWEL G. BEREND, *Petitioner*

v.

J. F. PRITCHARD & CO., *Respondent*

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OUT OF TIME AND PETITION FOR REHEARING

JEWEL G. BEREND
P. O. Box 12423
6920 Sandalwood Lane
Fort Worth, Texas 76116

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 237

JEWEL G. BEREND, *Petitioner*

v.

J. F. PRITCHARD & CO., *Respondent*

MOTION FOR LEAVE TO FILE A PETITION FOR REHEARING OUT OF TIME

Your undersigned petitioner, J. G. Berend, respectfully moves this honorable Court for leave to file his Petition for Rehearing out of time in the form annexed hereto, upon the following grounds:

1. This is an employee action for compensation for work related injuries and an accounting under a profit sharing agreement on sales of certain equipment designed by me for respondent. In all courts I have had to represent myself, the District Court having refused my requested appointment of court counsel.

2. An adverse decision of the District Court that my claims were barred by limitations under the law of

Texas, was affirmed without hearing by the Fifth Circuit Court of Appeals.

3. My petition for a writ of certiorari to this Court was denied on October 12, 1970. I then made inquiry of a Washington law firm as to what further procedure was available to review this determination of your Court. On February 4 they informed me that under Rule 58 the time to file a petition for rehearing had expired on November 8, 1970. On February 7, I sent to the Clerk the papers in the case with a request that a rehearing be granted. These were returned to me on the ground that they were not in form to be considered as a petition.

4. Since I was unable to file the petition for rehearing in proper time solely due to my lack of knowledge of the Rules, I respectfully petition that my fault in this respect be excused and that leave be granted for the filing of the annexed petition with the Clerk.

Respectfully submitted,

/s/ JEWEL G. BEREND
Jewel G. Berend, Petitioner
P. O. Box 12423
6920 Sandalwood Lane
Fort Worth, Texas 76116

STATE OF TEXAS
COUNTY OF TARRANT

Subscribed and Sworn To Before Me This 23 Day of March, 1971.

/s/ DICK CHILDERS
Notary Public.

Expires June 1, 1971

March 23, 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 237

JEWEL G. BEREND, *Petitioner*

v.

J. F. PRITCHARD & CO., *Respondent*

PETITION FOR REHEARING

The petition for a writ of certiorari herein to the United States Court of Appeals for the Fifth Circuit was denied on October 12, 1970. The petition sought the review of a *per curiam* affirmance of a decision of the United States District Court for the Northern District of Texas holding your petitioner's compensation claims time-barred under Article 5526 of the Texas

statutes, based on an interpretation of a fixed rather than continuing date of the underlying agreements.

Petitioner throughout has represented himself and has as a result failed to make clear in his filings before the lower courts the continuing nature of the negotiation covering his claim for work-related injury and breach of a profit sharing agreement with his former employer, with the result that an improper application of the limitation statute has been made without a determination on the underlying merits.

The Questions Presented in the petition were accordingly directed to the scope of the due process requirement of the Fifth Amendment to the Constitution in ensuring practical access of a civil complainant to the procedures of the Federal Courts in terms of requiring either the assignment of counsel in an appropriate case or the granting of equivalent assistance in framing a proper pleading to bring before the court of first instance the justiciable issues applicable to petitioner's situation.

On November 24, 1970 after the denial of the petition herein, this Court heard the closely related issue of improper limitation of access to courts by the imposition of filing costs on civil claimants in divorce proceedings (Boddie v. Connecticut, No. 27) and possessory actions (Sanks v. Georgia, No. 28) and your petitioner promptly requested legal advice as to the possibility of a rehearing.

Admittedly, the present petition goes a step further into the question, looking not merely to monetary but to procedural barriers to the effective expression of a civil claim by a layman.

Yet in equitable consideration there is no distinction between the two. The right to counsel in criminal matters is a recognition not merely of the constitutional right to be heard, but a judicial recognition that in the absence of counsel or professional direction, that right is circumscribed to unacceptable limits.

Petitioner does not contend that actual court-paid attorneys must be appointed in civil matters as constitutional requirement, but this is not to say that a total absence of legal guidance is thereby authorized. Our laws have always provided for self-representation by parties before the courts as an inherent part of our judicial process, but, as these procedures become more complex, the plaintiff who seeks redress on his own finds himself barred from effective participation and ultimately, as petitioner here, reaches the end of the available procedures without having ever come to meaningful grips with the legal essentials on which he must rely. In short, if due process requires that a citizen be permitted to represent himself, then it must of necessity require that that personal representation be made legally meaningful. As this Court has just said in deciding *Boddie*, —— U.S. —— (39 LW 4294) March 2, 1971

> "persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.
>
> "an opportunity . . . granted at a meaningful time and in a meaningful manner . . . for a hearing appropriate to the nature of the case"
>
> "within the limits of practicability"

A rehearing herein is hereby moved and on such rehearing petitioner prays that an order be entered granting his petition and remanding the same to the

Northern District of Texas for retrial after amendment of the complaint.

Respectfully submitted,

/s/ JEWEL G. BEREND
Jewel G. Berend, Petitioner
P. O. Box 12423
6920 Sandalwood Lane
Fort Worth, Texas 76116

STATE OF TEXAS
COUNTY OF TARRANT

Subscribed and Sworn To Before Me This 23 Day of March, 1971.

/s/ DICK CHILDERS
Notary Public.

Expires June 1, 1971

March 23, 1971

Certificate Under Rule 58

Petitioner hereby certifies that the within motion and accompanying petition for rehearing are presented in good faith and not for delay and are, as shown therein, restricted to the grounds specified, in Rule 58(2).

/s/ JEWEL G. BEREND
Petitioner

STATE OF TEXAS
COUNTY OF TARRANT

Subscribed and Sworn To Before Me This 23 Day of March, 1971.

/s/ DICK CHILDERS
Notary Public.

Expires June 1, 1971

Affidavit of Service

Petitioner herein, appearing pro se, hereby certifies that a copy of the annexed motion and petition for rehearing has been served by him upon respondent by depositing the same in the United States mail box, first-class, airmail, postage prepaid addressed to Messrs. Dietrich, Tyler, Davis, Burrell & Dious, Esquires, 1001 Dwight Building, Kansas City, Missouri 64105, counsel for respondent.

/s/ JEWEL G. BEREND
Petitioner

STATE OF TEXAS
COUNTY OF TARRANT

Sworn to before me this 23rd day of March, 1971.

/s/ DICK CHILDERS
Notary Public

Expires June 1, 1971

AIR MAIL—SPECIAL DELIVERY—REGISTERED

JEWEL G. BEREND
P. O. BOX 12423
FORT WORTH, TEXAS 76116

March 26, 1971

Clerk of the
Supreme Court of the United States
Washington, D. C. 20543

Dear Sir:

RE: Berend v. J. F. Pritchard & Co.
No. 237, October Term, 1970.

I, Jewel G. Berend, Request the Supreme Court of the United States, to at least advise, J. F. Pritchard & Company of Missouri & California, 4625 Roanoke Parkway, Kansas City, Missouri 64112

My 25-Years Employer, Whom I Developed Their Equipment Under Unusual Hazardous Conditions, To Avoid, United States Defense Plants, Shut Downs. Monies Due Me on This Work, $96,822.25, Since 1954, When I Was Confined and Disabled in the Continental Hotel, Kansas City, Missouri, and Could Not Protect My Interests.

To: At least Negotiate a Settlement With Me, as the Above Disabled Me for Life, My Wife and I Have to Exist. I Have Written, J. F. Pritchard & Co. Over a Hundred Letters and Made Three Special Trips to Their Office, They Refused To Talk to Me. I Am an American Citizen, I Request the Supreme Court of My Country, United

States, To Advise, J. F. Pritchard & Company to at least Negotiate With Me for Justice.

Very Truly Yours

/s/ JEWEL G. BEREND
JEWEL G. BEREND

Signed This the 26th Day of March, 1971, Before Notary Public in and for Tarrant County, Texas.

/s/ ABRAM GRIFFITH

CC: J. F. Pritchard & Company
4625 Roanoke Parkway
Kansas City, Missouri 64112

CC: Dietrich-Tyler-Davis-Burrell-Discus
1001 Dwight Bldg.
Kansas City, Missouri 64105

J. F. PRITCHARD & CO.
OF CALIFORNIA
A DIVISION OF J. F. PRITCHARD & CO.
4625 ROANOKE PARKWAY, KANSAS CITY 12, MO.

January 27, 1942

Selective Service Board,
Denton County
Denton, Texas

Gentlemen:

We respectfully submit the following information in regard to the employment of Mr. Jewel G. Berend of Longview, Texas:

We are manufacturers of cooling towers which are erected for water cooling purposes throughout the southwestern area of the country.

At the present time, we have a large volume of work on hand in this line, and every one of our jobs is in connection with a vital defense project of some nature which is evidenced by the fact that a priority rating of A-10 is the lowest rating that we have obtained on any of our jobs in the past six months.

Mr. Berend is the chief of our cooling tower erection crews and has been solely and directly responsible for the erection of these towers for the plants which we serve.

We trust that this information may be of value to you in arriving at his proper classification.

Respectfully yours,

J. F. PRITCHARD & Co.

By: /s/ J. F. PRITCHARD

JFP:j

bcc: JGBerend

[UNITED STATES WAR DEFENSE PLANTS. *J. F. Pritchard & Co. Sold Defective equipment to World War-2, Vital Defense Plants, I had to repair and replace same under hazardous conditions to avoid Vital War Defense Plant Shut Downs. So J. F. Pritchard & Co. Could Receive His Payment in Full for This Defective Equipment, J. F. Pritchard & Co. Requested This Deferment for Their Financial Gain, J. G. Berend Was Physically and Mentally Disabled.* When Confined & Disabled in Continental Hotel, Kansas City, Missouri.]